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No. 96-1921

In the Supreme Court of the United States

OCTOBER TERM, 1996

SIDNEY J. BROWN, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners lacked standing to pursue their claims for declaratory relief and lost profits in this proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-8) is unreported, but the decision is noted at 106 F.3d 442 (Table). The opinion of the district court (Pet. App. 4, at 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1997. A petition for rehearing was denied on March 4, 1997. Pet. App. 2. The petition for a writ of certiorari was filed on May 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, petitioner Nattchase Associates Limited Partnership, of which petitioners Brown and Bernstein are general partners, borrowed $36 million dollars from San Jacinto Savings Association, securing the loan with a non-recourse promissory note and a deed of trust on real property located in Loudoun County, Virginia. Pet. App. 3, at 4-5 & n.1. Petitioners began to default on the loan in 1989. *Id.* at 5. By March 1993, the arrearages amounted to more than $14 million in interest alone. FDIC C.A. Br. 6.

In 1990, San Jacinto was declared insolvent and the Resolution Trust Corporation (RTC) was appointed to act as its receiver.[1] Pet. App. 1, at 4. In liquidating San Jacinto's assets, see 12 U.S.C. 1821(d)(2), the RTC included petitioners' note in a pool of non-performing loans packaged together for sale. Pet. App. 1, at 4. The RTC informed prospective bidders that defaulting borrowers or their affiliates would not be permitted to bid unless they first settled their obligations with the RTC, and gave instructions for contacting the RTC to arrange a settlement. FDIC C.A. Br. 6. Petitioners did not settle their defaulted obligations before the sale. Bidding was conducted between March and May 1993, and in July the RTC sold the loan pool containing petitioners' note to CMF Loudoun, L.P. (CMF), realizing approximately $5 million on petitioners' $36 million note. Pet. App. 3, at 5; Pet. App. 4, at 3.

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[1] On December 31, 1995, the RTC's existence terminated by operation of law and the Federal Deposit Insurance Corporation succeeded to its responsibilities. See 12 U.S.C. 1441a(m). The FDIC has continued this litigation as successor to the RTC.

2. When CMF sought to foreclose on petitioners' note, petitioners sued CMF and the RTC in federal court in Virginia, alleging that the RTC had wrongfully deprived them of the opportunity to bid on the note. As relief, petitioners sought a declaration that the bidding procedures were unconstitutional, rescission of the sale, an injunction prohibiting foreclosure and requiring a new auction, and related damages. Pet. App. 3, at 5-6. The district court dismissed petitioners' suit. *Id.* at 6.

On appeal, the Fourth Circuit held (Pet. App. 3, at 10-11) that petitioners' request for an order rescinding the sale to CMF was barred by 12 U.S.C. 1821(j), which generally prohibits courts from taking "any action * * * to restrain or affect the exercise of powers or functions of the [RTC or FDIC] as a conservator or a receiver." With respect to petitioners' request for declaratory and monetary relief, the court held that the RTC had acted within its statutory authority in transferring petitioners' note to CMF (Pet. App. 3, at 7), and that petitioners were required to exhaust the administrative remedies provided by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, before seeking judicial review. Pet. App. 3, at 6-9. The court of appeals modified the district court's order to make clear that dismissal of the declaratory and monetary claims was without prejudice to the pursuit of those claims within the structure mandated by FIRREA. *Id.* at 9.

Petitioners sought this Court's review of the denial of equitable relief enjoining the sale of the Nattchase loan to CMF. They did not appeal the portion of the court's decision that required exhaustion of their

other claims. See RTC Br. in Opp. at 5 & n.1, No. 94-885. This Court denied review. 513 U.S. 1147 (1995).

3. Petitioners then filed an administrative claim, which the RTC denied in its entirety. See Pet. App. 1, at 5. They then filed this action seeking judicial determination of their claims. See 12 U.S.C. 1821(d)(6)(A). The complaint sought a declaration that the sale to CMF was unlawful, damages for an uncompensated deprivation of property, and damages for wrongful exclusion of petitioners from bidding on the notes on which they had defaulted. See Pet. App. 1, at 5-6.

The district court dismissed petitioners' suit. Pet. App. 4, at 1-10. The court held that petitioners' request for a judgment declaring the CMF sale void was precluded by the Fourth Circuit's previous decision holding that the transfer of assets to CMF was within the RTC's statutory authority. *Id.* at 6. It dismissed as "utterly without merit" (*ibid.*) petitioners' claim that their property had been taken without compensation—a claim that petitioners abandoned in the court of appeals (Pet. App. 1, at 6 n.3) and do not renew here (Pet. 10 n.4). Finally, the court rejected petitioners' "central" claim for damages based on wrongful exclusion from the bidding process (*id.* at 7), holding that no provision of law required the RTC to allow particular parties to bid on thrift properties, and that Congress had committed the selection of bidders largely to the agency's discretion. *Ibid.* In addition, the court held that petitioners lacked standing to pursue a "right to bid" claim against the RTC. *Id.* at 8.

4. The court of appeals affirmed. Pet. App. 1, at 1-8. Without reaching the merits, the court held that petitioners lacked standing to maintain the suit because

they could not obtain redress either on their claim for declaratory relief or on their claim for damages for wrongful exclusion. *Id.* at 6. On the first point, the court held that petitioners' request for "a 'declaratory' judgment that 'the sale of the notes to CMF was illegal, null and void'" was essentially the same as the claim for rescission that the Fourth Circuit had previously held was barred by 12 U.S.C. 1821(j). Pet. App. 1, at 6-7 & n.5. Having been litigated and determined in the prior proceedings, the claim was res judicata and could not be relitigated in this proceeding. *Id.* at 7. With regard to the damages claim, the court held that any losses stemming from petitioners' initial investment were caused by the failure of that investment and petitioners' own default, not by any act of the RTC, while any claim for lost profits was, in the context of this case, "simply too speculative" to confer standing on petitioners. *Id.* at 7-8.

ARGUMENT

1. Petitioners argue (Pet. 15-17) that the court of appeals should not have invoked the doctrine of res judicata in this case because the Fourth Circuit expressly provided that dismissal of the claims in petitioners' earlier action would be without prejudice. As the court below explicitly noted, however, while the Fourth Circuit did order that most of petitioners' earlier claims be dismissed without prejudice, it affirmed the dismissal *with* prejudice of their claim for an order rescinding the RTC's sale of the Nattchase note to CMF. Pet. App. 1, at 4-5;[2] see *id.* at 6-7; Pet.

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[2] The version of the court's opinion reprinted in the appendix to the petition omits a portion of the relevant text. See Pet. App. 1, at 4-5. The full passage reads:

App. 3, at 9-11. In this case, the court of appeals correctly recognized that petitioners' present request for "a 'declaratory' judgment that 'the sale of the notes to CMF was illegal, null and void'" was functionally equivalent to their previous claim seeking "a '[j]udgment declaring the [RTC's] bid process * * * to be void, unenforceable, and rescinded." Pet. App. 1, at 6, 7 n.5 (quoting the complaint in petitioners' first suit); compare *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982) ("[T]here is little practical difference between injunctive and declaratory relief."). Because the latter claim was fully litigated and determined on the merits in the Fourth Circuit proceedings, see Pet. App. 3, at 10-11, the court below properly declined to entertain it a second time.

2. Petitioners contend (Pet. 17-19) that the court of appeals erred in concluding that their monetary claims were too speculative to confer standing to sue.[3] The court acted well within its discretion, however, in concluding that the complaint's allegation of a "loss of * * * opportunities" (Pet. App. 1, at 7),

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On appeal the Fourth Circuit modified the district court's ruling to reflect dismissal *without prejudice* of most of the claims against the RTC, pending exhaustion of administrative remedies under 12 U.S.C. § 1821(d)(6)(A) and 1821(d)(13)(D)(ii). The court affirmed *with prejudice*, however, dismissal of the general partners' claim for "requested injunctive relief, rescission of the contract of sale between RTC and CMF for the note," concluding such relief was "barred by 12 U.S.C.A. § 1821(j)."

[3] Petitioners do not contest the court's separate holding that any damages attributable to their own initial investment and subsequent default "were not caused by the allegedly wrongful exclusion from bidding and therefore cannot confer standing to sue [the] RTC." Pet. App. 1, at 7 (footnote omitted).

which would require purported proof of "profits the partnership might have realized had it successfully bid on, purchased and developed the property" (*id.* at 7-8), did not specify a sufficiently concrete or demonstrable injury to permit petitioners to invoke the power of a federal court.[4] See generally *Allen* v. *Wright*, 468 U.S. 737, 750-752 (1984); *United Transp. Union* v. *ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990). Nothing in *United States* v. *Winstar Corp.*, 116 S. Ct. 2432 (1996), which dealt with the enforcement of government contracts, is to the contrary (see Pet. 18), or sheds any light on the issues in this case.

3. Petitioners argue (Pet. 19-22) that they should be accorded a private right of action to enforce the provisions of 12 U.S.C. 1441a(a)(14)(B), which deals with the general contents of the "strategic plan" for conducting the RTC's activities that was developed and submitted to Congress by the former Thrift Depositor Protection Oversight Board. See also Pet. 20 n.11, 22 (also mentioning 12 U.S.C. 1821(d)(13)(E), which sets standards for asset dispositions, and 12

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[4] At oral argument (see Pet. App. 1, at 7 n.6) and in their petition (at 19 n.9), petitioners have attempted to add some degree of specificity to their damage claim by suggesting that they incurred expenses in preparing a bid that they were not allowed to make. Aside from the fact that petitioners were surely on notice that they would not be permitted to bid unless they first settled with the RTC their defaulted debt to the failed thrift (see page 2, *supra*), and therefore made any investment in "bid preparation" solely at their own risk, petitioners neither alleged such expenses in their complaint nor referred to them in their appellate briefs. See Pet. App. 1, at 7 n.6. Petitioners cite nothing in the record to support their assertion to the contrary (Pet. 19 n.9).

U.S.C. 1441a(f), which explicitly *prohibits* the sale of assets to individuals who, like petitioners, have defaulted on obligations owed to a failed institution). The district court correctly rejected that contention. Pet. App. 4, at 8-9; see also Pet. App. 1, at 6 n.4.

There is no indication that Congress implicitly intended to provide a right of action for bidders excluded from an RTC auction—particularly bidders whose participation Congress specifically prohibited. To the contrary, Congress gave the RTC broad authority to liquidate the assets of failed institutions for distribution to creditors, including the express power to transfer assets unimpeded by any claim. See, *e.g.*, 12 U.S.C. 1821(d)(2)(B), (E), (G)(i)(II), and (J)(ii).[5] Moreover, the statute provides a comprehensive and exclusive remedial scheme, involving both administrative and judicial review, for persons wishing to assert claims against a failed institution or against the RTC as receiver. See 12 U.S.C. 1821(d)(5) and (13)(D). Under these circumstances, there would be no justification for inferring any unexpressed congressional intention to allow additional direct private litigation. See generally *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16, 19-24 (1979); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

4. Finally, petitioners argue (Pet. 23-27) that they have been denied due process by being left "entirely without a remedy" (Pet. 23). That is incorrect. After the Fourth Circuit correctly held that 12 U.S.C. 1821(j) barred them from attempting to rescind the

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[5] The legislative history indicates that the RTC was to be given the power to take all actions necessary to resolve the thrift crisis, and that it was intended to act expeditiously. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 307 (1989).

sale to CMF, petitioners were entitled to seek damages or other appropriate relief under the administrative claims process, followed by judicial review. 12 U.S.C. 1821(d)(5). They did so, and received full review of their claims at the administrative level. It is true that when they then sought judicial review, in this proceeding, they were unable to prevail (or even, in the court of appeals' view, to allege any relevant injury sufficiently concrete to allow them to proceed). But that result flows from the strong prohibitory force of Section 1821(j), which precludes rescission of the sale (or the equivalent declaratory judgment that petitioners sought here), and from the fact that their damage claim is completely without merit.[6]

Petitioners have not been denied a forum: They have merely failed to state any claim on which they are entitled to redress. Compare *National Trust for Historic Preservation* v. *FDIC*, 21 F.3d 469 (D.C. Cir.), reinstating in part 995 F.2d 238, 239 (D.C. Cir.

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[6] It is instructive to recall that petitioners borrowed $36 million from a federally insured savings and loan association, and then defaulted on the loan. By the time the thrift had failed and the federal receiver sought to sell the loan, petitioners owed more than $14 million in unpaid interest alone, and the receiver was able to realize only some $5 million by petitioners' note and deed of trust. See pages 2-3, *supra*. Petitioners' argument that they were wrongfully excluded from bidding on the note amounts to a claim that they were somehow entitled to a chance to retire their own defaulted debt for pennies on the dollar, in the process extinguishing the lien on the underlying property. Compare 12 U.S.C. 1441a(f)(1)(A)(i) ("The [RTC] shall * * * prohibit the sale of assets of a failed institution * * * to any person who * * * has defaulted * * * on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution.").

1993), cert. denied, 513 U.S. 1065 (1994). That is not a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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